

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

KRISTOPHER ALLEN HUGHES,

Defendant-Appellant.

Supreme Court  
No. 158652

Court of Appeals  
No. 338030

Circuit Court  
No. 2016-260154-FC

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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RESPONSE TO APPELLANT’S JURISDICTIONAL STATEMENT

The People as Plaintiff-Appellee agree that this Honorable Court has jurisdiction to consider Defendant-Appellant Kristopher Allen Hughes’s interlocutory application for leave to appeal following a decision by the Court of Appeals. Specifically, this Court has jurisdiction pursuant to MCL 600.215, MCR 7.303(B)(1), and MCR 7.305(C)(2). This Court considered Defendant’s application and ordered argument on the application and supplemental briefing, pursuant to MCR 7.305(H)(1), on November 1, 2019. *People v Hughes*, \_\_\_ Mich \_\_\_ (2019) (Docket No. 158652). (510a–511a)

COUNTER-STATEMENT OF QUESTIONS PRESENTED

**I. Did the probable cause underlying the search warrant properly authorize the police to obtain all of Defendant's cell phone data as part of their investigation in his other criminal case, when cell phones have long been recognized as essential tools of the drug trade by courts and police officers alike, including the affiant here, and when, based on the investigation laid out in the affidavit, it was established that Defendant was engaged in drug trafficking?**

The People answer, "yes."

Defendant answers, "no."

The trial court was not asked this question.

**II. Was the reasonable expectation of privacy Defendant had in his cell phone data extinguished when the police lawfully obtained the data pursuant to the valid search warrant issued in the drug trafficking investigation?**

The People answer, "yes."

Defendant answers, "no."

The trial court was not asked this question.

**III. Was the cell phone data at issue in this case also, in any event, within the scope of the probable cause underlying the search warrant from the drug trafficking investigation?**

The People answer, "yes."

Defendant answers, "no."

The trial court was not asked this question.

**IV. Was the review and later use at trial of some of the cell phone data as evidence in this case also proper because the officers acted in good-faith reliance on both the district court chief judge's probable cause determination after she reviewed the affidavit and the warrant itself?**

The People answer, "yes."

Defendant answers, "no."

The trial court was not asked this question.

*(Continued on next page.)*

**V. Did Defendant's trial counsel act effectively when he chose not to challenge the admission of the cell phone data in this case on Fourth Amendment grounds because any such challenge would have been futile?**

The People answer, "yes."

Defendant answers, "no."

The trial court was not asked this question.

## COUNTER-STATEMENT OF FACTS

Kristopher Allen Hughes (hereinafter “Defendant”) was charged in this case with one count of Armed Robbery, contrary to MCL 750.529, with a Habitual Fourth Offender (Mandatory 25-Year Minimum) Enhancement. Following a jury trial conducted over the course of three days before the Honorable Hala Y. Jarbou of the Oakland Circuit Court, Defendant was found guilty as charged on March 1, 2017, and later sentenced to a term of 25 to 60 years. (428a–430a, 446a)<sup>1</sup>

### **The Charged Incident:**

Ronald Stites, age 71, lived alone in a single-family home at 17 West Rutgers in Pontiac in August 2016. (151a–154a, 197a) He had difficulty standing and walking due to some medical issues, so to help his legs he often walked to and from nearby Baldwin Avenue. (153a–154a, 197a–198a) He went back and forth until he got tired. (155a, 198a) On August 6, 2016, he was on a walk when a woman he did not know approached him. (154a–155a, 198a–199a) She said she had been to his house before, but he did not remember her, and he guessed she was a prostitute. (155a, 199a, 220a) He was tired and wanted to go home, and he invited her to come watch TV. (156a, 199a)

They went inside, sat in the living room, and the woman then said she needed money for something to eat and drink. (156a–158a, 199a) One of them brought up the idea of having sex. (157a, 200a) The woman said she would stay all night for \$50, and Mr. Stites agreed. (158a–159a, 161a, 201a) She followed him to his room so he could get money from a safe, which contained over \$4,200 in cash and other items, and he pulled out a \$50 bill. (158a–159a, 161a, 200a–201a) He then locked the safe, put the bill on the bedroom TV stand, and told the woman she could have it when she left. (163–164a, 201a) Mr. Stites then performed oral sex on her. (164a, 201a)

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<sup>1</sup> All references included in this brief are to the record as contained in Appellant’s Appendix, which was filed concurrently with his supplemental brief on February 26, 2020. The People stipulate to the use of the Appellant’s Appendix, as permitted by the Court’s November 1, 2019, order.

When they finished, the woman said she was hungry, thirsty, and wanted to go to the store, and she picked up the money and left. (164a–165a, 201a–202a) She returned a short time later, without anything, and Mr. Stites let her in and relocked the door. (165a, 168a–169a, 202a–203a)

The woman then said she was going to call for some drugs, and they watched TV while they waited. (165a, 169a–170a, 202a–203a) A man arrived with some drugs twenty minutes later, and the woman let him in. (170a–171a, 203a–204a) The man was black and wore a jacket, jeans, and a ball cap, but he kept his head turned away from Mr. Stites. (171a–172a, 204a) He and the woman went into the kitchen. (171a–172a, 204a)

The man left a few minutes later, without ever looking at Mr. Stites. (173a, 204a) Mr. Stites got up, locked the door, and went to his bedroom with the woman. (173a–174a, 205a) She asked him to take “a pop” of the drug, crack cocaine, but he told her to blow some into his mouth. (174a, 205a, 207a) She then left to get some water. (174a–175a, 208a–209a) She returned, without anything, a minute later, and Mr. Stites began performing oral sex on her again. (176a, 207a–209a)

Suddenly, the woman jumped up, and Mr. Stites saw a black man dressed in the same clothes as the drug deliveryman pointing a black 40-caliber handgun at his face. (176a–177a, 207a–209a, 215a–216a) He told Mr. Stites to turn over. (177a–179a, 210a, 216a) The woman then said something about money in a safe and keys to it in a closet. (179a–181a, 210a–211a, 215a–216a) Someone tied Mr. Stites up, and the man demanded the safe’s combination, but Mr. Stites refused him. (180a–182a, 210a) The woman then said she found the keys. (181a–182a, 211a–212a) She and the man still could not open the safe, so they took it and left. (181a–184a, 212a–213a)

Mr. Stites eventually untied himself, and he saw that his safe with all his money was gone. (185a, 213a) He used his moped to go to a nearby 7-11 on Baldwin, called the police, and went home to wait for them. (185a–188a, 213a–214a)

Deputy Che McNeary arrived at Mr. Stites's home at 3:12 A.M. on August 6. (279a–281a, 287a–290a) Mr. Stites described to him a “[w]hite female” and a “black male” who had come to the house earlier to deliver crack to the woman. (286a–287a) He also pointed out the rope used to tie him up and some items the woman may have touched. (190a–194a, 282a) The deputy collected the items, which were later sent for fingerprinting by Lt. Steven Troy. (288a, 292a–294a)

Lt. Troy and the detectives began looking for prostitutes matching Mr. Stites's description, and they received a tip about a woman named Lisa Weber. (294a–295a, 304a–305a) Mr. Stites later went to the police station to look at photos. (194a–195a) One woman's photo looked a lot like the woman who had been in his house, although she looked in “a little rougher shape” in the photo. (194a–196a, 295a–296a, 306a) He was not able to identify any men. (196a)

Lisa Weber:

Lisa Weber, age 41, lived in the Pontiac area on August 6, 2016, at which time she was addicted to crack cocaine and prostituted herself for drugs.<sup>2</sup> (218a–219a, 245a–247a) She was the woman whom Mr. Stites met near his home late on August 5 or early on August 6, but she claimed he initiated their encounter. (220a–221a, 246a, 248a, 270a) She said yes because of her addiction. (221a–223a, 247a–248a) She told him she knew him, but he did not remember her because he had “[b]ad memory issues.” (220a, 247a) He eventually offered her \$50 to stay the night, but she said that would cost more. (223a–224a) She knew he wanted to trade money for oral sex. (223a, 249a)

Mr. Stites eventually gave her \$50 from his wallet while they were in the living room. (224a–225a, 250a) She then made a phone call, and she left to go get a drink and some crack. (225a–226a, 250a) She only ended up getting the crack, which she smoked before returning to Mr.

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<sup>2</sup> At trial, Ms. Weber claimed she had not used non-prescription drugs since coming out of rehab in November, and she did not drink. (241a–242a, 260a) The prosecutor had not made her any promises about not being prosecuted or any potential punishments if she was. (244a–245a, 313a)

Stites' house. (226a, 250a–251a, 255a, 269a–270a, 274a) When she returned, she told Mr. Stites about her addiction. (226a) He asked if she could get some crack, and she said yes. (226a) She then called a dealer she knew as “K-1” or “Killer.” (227a, 251a–254a) It was Defendant. (227a, 245a) She also sometimes bought drugs from another dealer named “Mack,” who lived farther away from Mr. Stites's house than Defendant. (262a–263a, 268a–269a, 271a–273a)

Defendant soon arrived with some crack, and Ms. Weber let him inside and led him to the kitchen to exchange the drugs and money while Mr. Stites stayed in the living room. (228a, 245a, 254a) She gave Defendant \$50 that had come from Mr. Stites's wallet. (228a–229a, 254a–256a) She then went and sat back down, and Defendant soon left. (229a–230a, 253a)

Mr. Stites and Ms. Weber then used the crack. (230a, 250a) Afterward, they went into the bedroom and got naked, and Mr. Stites began to perform oral sex on her. (230a, 257a, 265a) She did not leave the room at all. (231a) A few minutes later, Defendant walked into the bedroom, pointed a gun at them, and told her to tie Mr. Stites up and turn him face down. (231a–232a, 245a, 256a) She did so. (231a–232a) Defendant then began rummaging through the room before grabbing a safe and walking out the front door. (232a–233a) Ms. Weber might have told him about keys to the safe being in the closet, which she had heard from Mr. Stites. (233a, 265a–266a)

Ms. Weber grabbed her clothes and left. (234a) She did not call the police because she was scared. (234a, 259a) She stayed at a friend's house for a few days and kept using drugs. (234a, 260a) She saw Defendant during that time to get drugs, and he gave her some money that she assumed was “hush money” that she then used to buy drugs. (235a–237a, 261a–262a)

*The Continuing Investigation:*

On August 16, Ms. Weber went to speak with Lt. Troy and Detective Mullins after they contacted her through her mother. (234a–235a, 251a, 295a, 306a) She told them that on the night

of August 6 she met Mr. Stites at a 7-11 near his house, negotiated a price for sex, and went back to his house, where they ordered crack before having sex. (296a–297a) She called a man named “Killer” for \$50 worth of drugs, which he brought to Mr. Stites’ house. (297a) Mr. Stites bought the drugs, they smoked them, and then went to the bedroom; she was not sure if “Killer” was still there or not until he came into the bedroom with a gun and took a safe. (297a, 307a–308a) Lt. Troy was eventually able to identify a man named Kristopher Hughes as having the nickname “Killer” from a list of individuals with known nicknames, and Ms. Weber identified him from a photograph and gave a written statement. (238a, 297a–298a, 307a, 314a–315a) Later, he received a fingerprint analysis report that matched her fingerprints to two items from Mr. Stites’s home. (299a–300a)

*Defendant’s Arrest in Another Incident:*

In August 2016, Defendant was the target of a narcotics investigation led by Detective Matthew Gorman of the Oakland County Narcotics Enforcement Team (“NET”). On August 11, Det. Gorman submitted an affidavit to 50<sup>th</sup> District Court Chief Judge Cynthia Thomas Walker requesting a search warrant. In pertinent part for purposes of this case, the affidavit stated:

2. The property to be searched for and seized, if found, is specifically described as:

All substances being in violation of the Michigan Public Health Code, specifically, but not limited to, crack cocaine. Materials and equipment for manufacturing/handling said controlled substances, scales and weighing equipment for controlled substances, lists and records pertaining to the manufacture, possession, ownership, and/or sales of controlled substances, lists and records of possession and/or ownership and/or residency of the above place to be searched, guns and ammunition, currency and coins, computers, cell phones, telephone answering machines and tapes, police monitoring equipment, and other items which are proceeds or items which were purchased with the proceeds of the sale of controlled substances. Also to be seized are business, tax, travel and/or financial records.

3. The facts establishing probable cause for the search are:

a. Affiant is a police officer for the city of Rochester, Rochester City Police Department. Affiant has been assigned to the Oakland County Sheriff's Office Narcotics Enforcement Team for the past nine months and has been employed as a law enforcement officer for the past eight years seven months. Affiant has successfully completed a basic drug investigations course, an advanced roadside interview for drug interdiction, DEA Undercover narcotics school, and advanced undercover narcotics workshop. Affiant has completed the MCOLES basic police academy in Kalamazoo and received an associates degree in Law Enforcement from Kalamazoo Valley Community College. I have been involved in numerous executions of search warrants which resulted in the seizure of controlled substances, cutting material, narcotics growing material, packaging equipment and materials, drug paraphernalia, weighing instruments, narcotic tabulations, electronic communication and telephone codes, maps, and documentary evidence related to drug trafficking activities. I have also utilized confidential informants, and have been involved in undercover purchases of controlled substances from drug traffickers. I have also been involved in field testing, weighing, and the identification of controlled substances. I know the following to be true, from personal investigation and from information provided to me from fellow investigators/police reports.

b. Based upon my training and experience involving the concealment of funds and assets from the detection of governmental agencies, I know that drug traffickers maintain books, records, receipts, notes, ledgers, and other papers relating to the procurement, distribution, storage, and transportation of controlled substances. These documents include, but are not limited to, records showing the phone numbers of customers, the e-mail addresses, text messages, or PIN numbers associated with the numbers of customers, the amount of controlled substances "fronted" to various customers along with running totals of debts to customers. Drug traffickers frequently maintain receipts such as credit card billings, parking stubs, hotel reservations/records, airline tickets, gas receipts and various notes. Items used to package controlled substances are also frequently maintained by drug traffickers. It is also common for these traffickers to maintain electronic devices that are used to facilitate their criminal activities, to include, but not limited to, mobile telephones, personal digital assistants, paging devices, answering machines, police scanners and money counters. It is common for drug traffickers to conceal narcotics records, narcotics proceeds and other related items described above within their residences, garages, safety deposit boxes, businesses, automobiles, and on their persons, in order that they may have ready access to these items. Drug traffickers commonly maintain address books and/or telephone numbers in books, papers, and wireless electronic devices that reflect the names, addresses, e-mail addresses, telephone numbers, pager numbers, and/or PINs for electronic communications with their criminal associates in the drug trafficking organization, even if said items are in code.

\* \* \*

d. I have participated in numerous investigations involving narcotics and controlled substances, including crack cocaine. I have also participated in countless hours of surveillance, observing and recording movements of persons trafficking in drugs and those suspected of trafficking in drugs. I have participated in and/or executed numerous search warrants authorizing the search of locations such as residences, storage facilities, and vehicles related to drug traffickers and their co-conspirators. These investigations have resulted in arrests of numerous individuals, the seizure of illicit drugs and drug-related evidence, and the forfeiture of drug-related assets.

e. As a result of my experience, I have encountered and have become familiar with the day-to-day operations and various practices, tools, trends, paraphernalia and related articles utilized by various traffickers in their efforts to cultivate, possess, import, conceal, and distribute controlled substances, including crack cocaine. I have also consulted with and discussed these investigations with numerous officers and agents who are very experienced in these types of investigations.

\* \* \*

4. Based upon your affiants training and experience involving narcotic traffickers and their concealment of funds and assets from the detection of governmental agencies, your affiant knows the following:

\* \* \*

e. That drug traffickers maintain books, records, receipts, notes, ledgers, airline tickets, money orders, passports, and other papers relating to the procurement, distribution, storage, and transportation of controlled substances. These records include the telephone numbers of customers, the amount of controlled substances distributed to various customers, along with running totals of debts owed by those customers. They also maintain paraphernalia utilized to cut and package controlled substances. These aforementioned items are commonly maintained in locations to which narcotic traffickers have frequent and ready access, i.e., homes, business, and automobiles.

f. That the aforementioned books, records, receipts, notes, ledgers, etc., are maintained where the drug traffickers have ready access to them.

\* \* \*

l. That drug traffickers commonly use electronic equipment to aid them in their drug trafficking activities. This equipment includes, but is not limited to, digital display pagers, mobile telephones, electronic telephone books, electronic date books, computers, computer memory disks, money counters, electronic

surveillance equipment, eavesdropping equipment, police radio scanners, and portable communication devices.

\* \* \*

5. During the past 60 days, your Affiant has received information from a credible and reliable Confidential Informant [hereafter referred to as CS-1], relative to the narcotic trafficking activities of Kristopher Hughes and Patrick Pankey, CS-1 provided the following information relative to the crack cocaine trafficking activities of Pankey and Hughes. CS-1 advised that PANKEY and HUGHES are members of an organization, arranging the processing and distribution of large scale quantities [of] crack cocaine and other narcotics from local sources to Oakland County for distribution to the local Pontiac area. CS-1 advised that PANKEY and HUGHES are responsible for the local trafficking of the crack cocaine in the Oakland County area.

6. CS-1 informed your affiant that he/she knows from observations of PANKEY and HUGHES, conversations with PANKEY and HUGHES that PANKEY and HUGHES, are distributing/trafficking multi ounce quantities of crack cocaine per week throughout the Oakland County area and that their drug trafficking activities are on-going to present date. CS-1 explained to your affiant that he/she has observed PANKEY and HUGHES during the past 60 days and as recent as within the past 48 hours conduct narcotics trafficking activities in Oakland County, Michigan. CS-1 advised [that] he has observed and has had conversations with PANKEY and HUGHES that HUGHES is PANKEY's main supplier of narcotics.

\* \* \*

9. Your affiant has conducted multiple controlled purchases of narcotics from PANKEY and with the cooperation of CS-1 over the past 30 days and as recent as the past 48 hours at 45 W Beverly Ave, Pontiac MI. Note: HUGHES was present during the last controlled purchase of narcotics (within the past 48 hours) at the 45 W. Beverly, address, and during this narcotic transaction, the CS-1 was made aware that HUGHES was the source of supply of the cocaine from the observations and conversations that the CS-1 had with PANKEY and HUGHES. [32a–35a, 37a–40a<sup>3</sup>]

The affidavit also included information from public and law enforcement database searches concerning the two addresses where the two men's driver's licenses were registered, a third address

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<sup>3</sup> Paragraph 9 of the affidavit also included a brief description of the controlled buy procedure and the fact that the purchased substance tested positive for cocaine. (41a)

where Defendant was registered for parole, and both men's criminal histories. (41a–43a) The detective noted that he believed searching the addresses would “result in the seizure of narcotics as well as documentary evidence tending to establish a large scale drug conspiracy” and that a warrant for those locations would “greatly assist the NET in the identification of additional co-conspirators, crack cocaine sources of supply, and also to identify crack cocaine customers” while also resulting in the seizure of drug records, drug proceeds, and drug paraphernalia. (43a)

Ultimately, Judge Thomas issued a warrant that, in conjunction with its “ATTACHED AFFIDAVIT,” authorized a search of the three addresses and the 2001 GMC Yukon referenced in the affidavit. (30a (all-capital emphasis original)) It also ordered that:

[A]ny cell phones or computers or other devices capable of digital or electronic storage seized by authority of this search warrant shall be permitted to be forensically searched and or manually searched, and any data that is able to be retrieved there from shall be preserved and recorded. [30a]

Overall, the warrant authorized a search for and seizure of:

Crack cocaine, and any other illegally possessed controlled substances; any raw material, product, equipment or drug paraphernalia for the compounding, cutting, exporting, importing, manufacturing, packaging, processing, storage, use or weighing of any controlled substance; proofs of residence, such as but not limited to, utility bills, correspondence, rent receipts, and keys to the premises; proofs as to the identity of unknown suspects such as but not limited to, photographs, certificates, and/or diplomas; prerecorded, illegal drug proceeds and any records pertaining to the receipt, possession and sale or distribution of controlled substances including but not limited to documents, video tapes, computer disks, computer hard drives, and computer peripherals; other mail receipts, containers or wrappers; currency, property obtained through illegal activity, financial instruments, safety deposit box keys, money order receipts, bank statements and related records; firearms, ammunition, and all occupants found inside. [30a]

On August 12, 2016, Deputy Charles Janczarek was part of the team that executed the search warrant. (316a–319a) Defendant was found exiting a car that was on one of the properties being searched. (318a–320a) He was detained, and a phone was removed from his person and turned over to Det. Gorman. (319a–321a)

Cell Phone Forensic Analysis:

Detective Edward Wagrowski of the Oakland County Sheriff's Office's Computer Crimes Unit has received specialized training to conduct cell phone forensic analyses, including extracting data from cell phones. (323a–325a) Around August 23, 2016, Det. Wagrowski received from Det. Gorman a cell phone related to the search warrant execution. (324a–325a) He was asked to analyze the phone, an LG K7 phone model LG MS330, and extract any information he could from it. (325a–326a) He had the warrant to ensure that he had authorization to do the extraction. (342a) After performing the extraction, he created a report that included thousands of text messages, photographs, and call logs, totaling over 600 pages. (326a–329a, 341a–342a)

Later, Det. Wagrowski was asked by the prosecutor in this case to review the previously extracted data from around August 6, 2016, for both Ms. Weber's phone numbers and Mr. Stites's phone number. (329a–331a, 350a) He found 19 call logs for August 6 alone, plus 15 text messages showing contact with one of Ms. Weber's numbers—which was saved under the contact name “Lisa”—between August 5 and 10, 2016. (330a–335a, 351a–353a) He also looked for references in the text messages to the names “Lisa,” “Killer,” and “Kristopher,” and he received several results. (334a–340a, 353a–355a) He did not find any text messages for “Lisa's” number that used the terms “K-I-L-L” or “Kristopher.” (355a) The detective was not familiar with Defendant other than their interactions in the courtroom, but he did find several photos of Defendant on the phone, including some that were taken by the phone's camera in June and July 2016. (341a–347a, 356a)

Lisa Weber's Second Interview

In the past, Ms. Weber had two phone numbers: 810-525-2561 and 248-894-4069. (239a–240a) In November 2016, she again met with Lt. Troy and Det. Mullins to talk about phone records. (242a–243a, 259a, 300a, 309a) The logs showed text messages and phone calls between

herself and Defendant, including some that made it look like she was involved in the robbery because she said how many televisions Mr. Stites owned. (243a–244a, 258a, 266a–267a, 301a) She did not deny sending any of the text messages or making any of the calls, but she denied being involved in the robbery. (301a, 309a–310a)

**Procedural Matters:**

Before jury selection began on February 27, 2017, the defense objected to the admission of data obtained from the cell phone on the ground it was irrelevant and stale. (115a–121a) The prosecutor noted that the data she wanted to present focused on calls and text messages made on or around the offense date to Ms. Weber. (120a) The court ruled that the data was relevant because the phone was on Defendant’s person when he was arrested and that any other information that tied him to the phone and related to the offense date could be presented, subject to cross-examination. (118a–120a) There were no objections on any other basis. (115a–121a)

Following testimony, closing arguments, and final instructions on February 28, 2017, the jury deliberated for about three hours on March 1, 2017 before returning a guilty verdict. (357a–420a, 426a, 428a–430a) Defendant was sentenced to a term of 25 to 60 years. (446a)

On appeal, Defendant’s appointed appellate counsel raised one issue: whether an additional search warrant was required before the police could reexamine the data from the cell phone from Defendant’s drug case. In a Standard 4 brief, Defendant raised an unrelated issue. In a unanimous 6-page unpublished per curiam opinion issued on September 25, 2018, the Court of Appeals (TUKEL, P.J., and BECKERING and SHAPIRO, J.J.) reviewed both unpreserved issues for plain error and affirmed Defendant’s conviction. (453a–458a) As to the cell phone issue, the Court noted Defendant did not challenge the warrant’s validity and concluded he had no reasonable expectation of privacy in the phone’s data after it was searched pursuant to the valid warrant. (455a)

Defendant then sought leave to appeal from this Court, acting *in propria persona*. The Court directed the People to answer the application on June 12, 2019. *People v Hughes*, 928 NW2d 209 (2019). On November 1, 2019, the Court entered an order directing the Clerk to schedule oral argument on Defendant's application, directing the trial court to appoint the State Appellate Defender Office to represent Defendant, and directing the parties to address the following issues:

- 1) Whether the probable cause underlying the search warrant issued during the prior criminal investigation authorized police to obtain all of the defendant's cell phone data.
- 2) Whether the defendant's reasonable expectation of privacy in his cell phone data was extinguished when the police obtained the cell phone data in a prior criminal investigation.
- 3) If not, whether the search of the cell phone data in the instant case was within the scope of the probable cause underlying the search warrant issued during the prior criminal investigation.
- 4) If not, whether the search of the cell phone data in the instant case was lawful.
- 5) Whether trial counsel was ineffective for failing to challenge the search of the cell phone data in the instant case on Fourth Amendment grounds. [510a–511a]

Defendant's supplemental brief was filed on February 26, 2020. The People now file their supplemental brief. Additional pertinent facts or procedural history may be discussed in the body of this brief's Argument section to the extent necessary to more fully advise this Honorable Court as to the issues raised.

### SUMMARY OF THE ARGUMENT

The People respectfully ask this Honorable Court to deny Defendant's application for leave to appeal or, in the alternative, to affirm his conviction and sentence because the police lawfully obtained and reviewed cell phone data that identified Defendant as the perpetrator of the offense in this case.

It has long been held that the touchstone of the Fourth Amendment is reasonableness, and this principle applies regardless of the underlying nature of the object to be searched or seized. In *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014), the Supreme Court of the United States held that, in most circumstances, *warrantless* searches of modern cell phones are improper in light of the vast amount of personal information such devices often contain. The Court concluded with a simple directive for law enforcement officers in most (non-emergency) cases to undertake before searching a cell phone: "*get a warrant.*" *Id.* at 403 (emphasis added).

Here, the police followed *Riley's* command. In August 2016, Det. Matthew Gorman secured a search warrant from 50<sup>th</sup> District Court Chief Judge Cynthia Thomas Walker as part of a drug trafficking investigation. The warrant's attached affidavit described in detail Det. Gorman's training and experience in drug trafficking investigations. This included his knowledge that traffickers commonly use electronic equipment like cell phones for communication and recordkeeping purposes as part of their illegal activities. Courts and police officers alike have in fact long recognized cell phones as essential tools of the illegal drug trade, just as Det. Gorman did. Moreover, Det. Gorman also included details of his investigation of Defendant's drug trafficking operation, such as his use of a confidential informant to conduct controlled drug buys.

Ultimately, when the search warrant was executed, a cell phone was seized from Defendant while he was present at one of the warrant's three listed locations. Later, Det. Edward Wagrowski

copied the phone's data for review. The seizure of the phone and the search of its data were both authorized by the warrant. Some of the data was later used as evidence in this case.

Based on the totality of the circumstances, the police acted reasonably when they requested authority to seize cell phones and obtain their data. All the information in Det. Gorman's affidavit, including his training and experience with respect to the use of cell phones by drug traffickers, was properly included. The affidavit gave Chief Judge Walker a more-than-sufficient basis to conclude that there was a fair probability that contraband or evidence of a crime would be found on *any* cell phone (as well as on or in many other places) located at the three listed locations and on any persons who were there. This was all that was required for a valid warrant to issue.

The officers' actions also extinguished any reasonable expectation of privacy Defendant had in the cell phone at issue here or in its data, by lawfully exposing that data to their view. Moreover, the warrant properly authorized an extensive search for evidence of drug trafficking; yet, the specific data at issue here—even though it did not need to be because the warrant properly authorized a thorough examination of the cell phone—clearly fell within the scope of the affidavit's probable cause. The various contacts between Defendant and Ms. Weber just before the charged incident were inextricably intertwined with drug dealing, because they established Defendant's identity as the drug dealer who robbed Mr. Stites. Furthermore, with respect to the cell phone data, the officers acted in good-faith reliance on Chief Judge Walker's decision to issue the warrant, because of the longstanding legal principles that cell phones are essential tools of the drug trade and that officers' experience may be included in judges' probable cause determinations.

For all these reasons, Defendant's trial counsel was not ineffective when he chose not to raise a Fourth Amendment challenge in this case. Accordingly, the Court should deny Defendant's application for leave to appeal.

## ARGUMENT

I. Based on the investigation laid out in the search warrant affidavit from Defendant's other criminal case, it was established he was engaged in drug trafficking. Because cell phones have long been recognized as essential tools of the drug trade by courts and police officers alike, including the affiant here, the probable cause underlying the search warrant properly authorized the police to obtain all of Defendant's cell phone data.

### *Standard of Review & Issue Preservation:*

This issue was not preserved for appellate review because Defendant never challenged the validity of the warrant and its underlying affidavit, either in his other criminal case or in this case.<sup>4</sup>

An issue that is not preserved for appellate review by a timely objection in a trial court is reviewed for plain error. *People v Carines*, 460 Mich 750, 763–764; 597 NW2d 130 (1999). To avoid forfeiture of an unpreserved issue, a party must show that: 1) an error occurred; 2) the error was plain, *i.e.*, obvious; and 3) the error affected the party's substantial rights. *Id.* The term “affecting substantial rights” means that the error was “prejudicial: It must have affected the outcome of

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<sup>4</sup> Notably, Defendant never previously raised the arguments in Part I of his supplemental brief in the trial court, in the Court of Appeals, or in his application for leave to appeal in this Court. In fact, he has never contested the validity of the search warrant until now. Thus, any claim that he should prevail on different grounds than those previously raised is waived. *See People v Shami*, 501 Mich 243, 257 n 34; 912 NW2d 525 (2018) (“Because [a constitutional vagueness argument] was cursorily raised for the first time in [the defendant’s] application for leave to appeal in this Court, [he] waived this argument.”). As Justice CLEMENT cogently observed, citing Justice SCALIA, “appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.” *Mich Gun Owners, Inc v Ann Arbor Public Sch*, 502 Mich 695, 723–724; 918 NW2d 756 (2018) (CLEMENT, J., concurring), citing *Jefferson v Upton*, 560 US 284, 301; 130 S Ct 2217; 176 L Ed 2d 1032 (2010) (SCALIA, J., dissenting). *See also Mich Gun Owners, Inc*, 502 Mich at 709, 710 n 9 (opinion of the Court) (emphasis original) (finding that the plaintiffs abandoned the issue by failing to state it in their application for leave to appeal and indicating that “[i]f ever we ‘take rules regarding issue preservation and abandonment very seriously,’ it should be here.”); *Admire v Auto-Owners Ins Co*, 494 Mich 10, 17 n 5; 831 NW2d 849 (2013) (“The Court of Appeals erred by considering the implications of the transportation purchase agreement because plaintiff never raised that issue in his complaint or argued it at the trial court. Therefore, the issue was waived.”); *People v Worthington*, 503 Mich 863, 864 (2018) (VIVIANO, J., concurring) (noting that “it is not our role to find and develop unpreserved arguments on behalf of litigants.”); *Baxter v Geurink*, 493 Mich 924, 924 (2013), quoting *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (noting that “Michigan generally follows the ‘raise or waive’ rule of appellate review.”).

the . . . proceedings.” *People v Grant*, 445 Mich 535, 552–553; 520 NW2d 123 (1994). Even if a plain error occurred that affected a defendant’s substantial rights, a reviewing court should only reverse if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, 460 Mich at 774.

***Discussion:***

In the search warrant affidavit in Defendant’s other criminal case, the affiant, Det. Gorman, thoroughly laid out the details of his investigation and explained how Defendant and an associate, Patrick Pankey, were engaged in drug trafficking, including (but not limited to) the fact that a confidential informant previously used by the detective made controlled buys of cocaine from Defendant and Pankey and identified Defendant as a source of cocaine. Cell phones have long been recognized, both by courts and by police officers, as essential tools of the illegal drug trade. In the affidavit, Det. Gorman noted his training and his own experience with drug traffickers’ use of cell phones, both for communication with associates and customers and for recordkeeping purposes. Considering the totality of the circumstances and affording proper deference to the district court judge’s probable cause determination, there was clearly a reasonable, logical likelihood that evidence of criminal activity would be found on any cell phones discovered during the execution of the warrant. The probable cause underlying the warrant therefore properly authorized the police to obtain all of Defendant’s cell phone data.

**A. The Fourth Amendment and judicial review of search warrants and search warrant affidavits.**

The lawfulness of a search or seizure depends on its reasonableness. *Ohio v Robinette*, 519 US 33, 39; 117 S Ct 417; 136 L Ed 2d 347 (1996), quoting *Florida v Jimeno*, 500 US 248, 250; 111 S Ct 1801; 114 L Ed 2d 297 (1991) (“[T]he ‘touchstone of the Fourth Amendment is reasonableness.’”). See also *People v Williams*, 472 Mich 308, 314; 696 NW2d 636 (2005).

Reasonableness “is measured in objective terms by examining the totality of the circumstances.” *Robinette*, 519 US at 39.

### 1. Search warrants and the probable cause standard.

There is a “strong preference for searches conducted pursuant to a warrant.” *Illinois v Gates*, 462 US 213, 236; 103 S Ct 2317; 76 L Ed 2d 527 (1983). A warrant will only issue upon a showing of probable cause, which “exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched.” *People v Russo*, 439 Mich 584, 606–607; 487 NW2d 698 (1992). “[P]robable cause . . . is not a high bar: It requires only the kind of fair probability on which reasonable and prudent people, not legal technicians, act.” *Kaley v United States*, 571 US 320, 338; 134 S Ct 1090; 188 L Ed 2d 46 (2014), quoting *Florida v Harris*, 568 US 237, 244; 133 S Ct 1050; 185 L Ed 2d 61 (2013) (cleaned up). It does *not* require absolute certainty, *see Gates*, 462 US at 238, or even a *prima facie* showing of criminal activity. *United States v Morris*, 977 F2d 677, 684 (CA 1, 1992). While a sufficient nexus must be shown between a place to be searched or a thing to be seized and criminal behavior, *see Warden v Hayden*, 387 US 294, 307; 87 S Ct 1642; 18 L Ed 2d 782 (1967), that nexus may be established by several factors, “includ[ing] ‘the nature of the crime and the reasonable, logical likelihood of finding useful evidence.’” *United States v Johnson*, 848 F3d 872, 878 (CA 8, 2017), quoting *United States v Colbert*, 828 F3d 718, 726 (CA 8, 2016). “Circumstantial evidence may be used to establish [the] nexus.” *State v Odum*, 925 NW2d 451, 456 (ND, 2019).

An affidavit requesting a search warrant “must contain facts within the knowledge of the affiant, as distinguished from mere conclusions or beliefs,” and the affiant may not draw his or her own inferences but rather “must state matters which justify the drawing of them.” *People v Rosborough*, 387 Mich 183, 199; 195 NW2d 255 (1972), quoting 2 Gillespie, Michigan Criminal

Law & Procedure (2d ed), § 868, p 1129 (internal quotation marks omitted, emphasis deleted). Furthermore, an affiant's representations regarding his or her experience may also be included and considered in the judge's or magistrate's probable cause determination. *See People v Custer*, 465 Mich 319, 331–332; 630 NW2d 870 (2001) (citing the officer's training and 23 years of experience as one factor supporting probable cause). *See also People v Waclawski*, 286 Mich App 637, 698; 780 NW2d 321 (2009) (noting that an affiant's experience "is relevant to the establishment of probable cause."); *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997) (same). Ultimately, though, "[t]o provide adequate support for a warrant, the affidavit need not *prove* anything."<sup>5</sup> *People v Whitfield*, 461 Mich 441, 445; 607 NW2d 61 (2000) (emphasis original).

## **2. Judicial review of search warrants and their supporting affidavits.**

Given the strong preference for searches conducted pursuant to a warrant, the issuing judge's probable cause determination must be "paid great deference by reviewing courts." *Gates*, 462 US at 236, quoting *Spinelli v United States*, 393 US 410, 419; 89 S Ct 584; 21 L Ed 2d 637 (1969). Review is neither de novo nor for an abuse of discretion. *Russo*, 439 Mich at 603. The reviewing court need only ensure there was a "substantial basis" for concluding that there was "a fair probability that contraband or evidence of a crime" would be found in the particular place to be searched. *People v Keller*, 479 Mich 467, 474; 739 NW2d 505 (2007), quoting *Gates*, 462 US at 238–239, quoting *Jones v United States*, 362 US 257, 271; 80 S Ct 725; 4 L Ed 2d 697 (1960).

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<sup>5</sup> Additionally, when an affidavit is based, in whole or in part, on information supplied by an unnamed person, the affiant must include "affirmative allegations from which the judge or district magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." MCL 780.653(b). Alternatively, a warrant may be issued if the police conducted an independent investigation to confirm the accuracy and reliability of the information offered in the affidavit, regardless of the knowledge or reliability of an unnamed source. *Waclawski*, 286 Mich App at 699.

A reviewing court considers only the facts presented to a judge or magistrate before they signed the warrant. *Nathanson v United States*, 290 US 41, 47; 54 S Ct 11; 78 L Ed 159 (1933). However, the warrant and its affidavit “are to be read in a common-sense and realistic manner” in order to determine whether a reasonably cautious person could have concluded that there was a substantial basis for finding probable cause. *Whitfield*, 461 Mich at 446. *See also Russo*, 439 Mich at 603, quoting *People v Landt*, 439 Mich 866, 866 (1991). A search warrant affidavit should not be read in a “hypertechnical, rather than a commonsense, manner.” *Gates*, 462 US at 236, quoting *United States v Ventresca*, 380 US 102, 109; 85 S Ct 741; 13 L Ed 2d 684 (1965) (internal quotation marks omitted). “A grudging or negative attitude by reviewing courts toward warrants’ is inconsistent with the Fourth Amendment’s strong preference for searches conducted pursuant to a warrant.” *Gates*, 462 US at 236, quoting *Ventresca*, 380 US at 108 (internal citation omitted).

**B. The probable cause underlying the warrant was more than sufficient to authorize the police to obtain all of Defendant’s cell phone data because cell phones are well recognized as essential tools for drug traffickers, and it was established through information in the affidavit that Defendant was engaged in drug trafficking.**

The probable cause underlying the search warrant at issue here was more than sufficient to authorize the police to obtain all of the data from the cell phone found on Defendant’s person when he was arrested at one of the locations listed in the warrant. (30a) Defendant contends that the probable cause was insufficient to even allow the seizure of his phone, let alone for the police to obtain any data from it, and he advocates for a far greater level of certainty than has ever been required to show probable cause that the cell phone of a drug trafficker would contain evidence of criminal conduct. Defendant’s position is incorrect, because a person of reasonable caution would be more than justified in concluding that evidence of criminal conduct would be found on a cell phone carried on the person of a narcotics trafficker while that person was at a location where drug trafficking activity was occurring. *E.g.*, *Russo*, 439 Mich at 606–607.

The principle that the police may search for and seize all known tools of the drug trade is long established in Michigan’s jurisprudence. For example, our Court of Appeals’ opinion in *People v Zuccarini*, 172 Mich App 11; 431 NW2d 446 (1988), is instructive. In *Zuccarini*, the search warrant affidavit set forth probable cause to believe that the defendant’s home was being used for illegal drug trafficking and that he was involved in that activity. *Id.* at 16. The warrant authorized the police to seize “all firearms” in the house. *Id.* The defendant argued that the warrant’s “all firearms” description was overly broad and that the evidence should therefore be suppressed. *Id.* The Court of Appeals disagreed, holding that the warrant was not overly broad because:

[W]e find that the description “All firearms” was not overly broad since specific facts were alleged in the affidavit indicating that the house was the site for drug trafficking, and it was further alleged that firearms are often kept by persons involved in drug use for protection and potential use during drug transactions. A general description, such as “weapons,” is not overly broad if probable cause exists to allow such breadth. [*Id.*]

The Court also held that “[t]he descriptions ‘All money and property acquired through the trafficking [sic] of narcotics’ and ‘Ledgers, records or paperwork showing trafficking [sic] in narcotics’ were sufficiently particular to pass constitutional muster since the executing officers’ discretion in determining what was subject to seizure was limited to items related to drug trafficking.” *Id.* at 15–16.

Like the firearms described in *Zuccarini*, cell phones are well recognized by both courts and police officers alike as “essential tools of [the] drug trade.” *United States v Portalla*, 496 F3d 23, 27 (CA 1, 2007). Caselaw—dating from the early days of common cell phone usage through today—acknowledges as much. *E.g.*, *United States v Hathorn*, 920 F3d 982, 985 (CA 5, 2019) (“Cell phones, computers, and other electronic devices are vital to the modern-day drug trade.”); *United States v Nixon*, 918 F2d 895, 900 (CA 11, 1990) (“[P]en register activity indicated phone

calls to and from the house with known drug dealers and to cellular phones, a known tool of the drug trade.”).<sup>6</sup> Moreover, the caselaw is equally clear that when the digital tools that are an essential part of a criminal enterprise are seized, a thorough examination of them is required “because criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity [such that] a broad, expansive search of the [device] may be required.” *United States v Bass*, 785 F3d 1043, 1049 (CA 6, 2015), quoting *United States v Richards*, 659 F3d 527, 538–539 (CA 6, 2011) (citations and quotation marks omitted). This applies equally both to computers and

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<sup>6</sup> Cases that recognize this fact include: **1) other federal courts of appeals**, e.g., *United States v Hammett*, 555 F Appx 108, 110 (CA 2, 2014) (“He was also found with a digital scale and two cell phones, which are tools that drug dealers often possess.”); *United States v Lazcano-Villalobos*, 175 F3d 838, 844 (CA 10, 1999) (“[C]ellular telephones are recognized tools of the drug-dealing trade.”); *United States v Sasson*, 62 F3d 874, 886 (CA 7, 1995) (describing cell phones, weapons, and other items as “the usual ‘trappings’ of a person involved in the drug trade”); *United States v Slater*, 971 F2d 626, 637 (CA 10, 1992) (“The search of his vehicle produced a large amount of cash, a semiautomatic pistol, and a cellular phone, each of which is a recognized tool of the trade in drug dealing.”); **2) federal district courts**, e.g., *United States v Hernandez-Mieses*, 257 F Supp 3d 165, 177 (D PR, 2017), vacated in part on other grounds 931 F3d 134 (CA 1, 2019) (noting that both “firearms and cellular phones are well-known tools of the drug trade”); *United States v Delva*, 13 F Supp 3d 269, 278 (SD NY, 2014) (“Courts have routinely denied motions to suppress the seizure of cell phones, in the context of narcotics conspiracies, based on knowledge that the phones may contain contacts and other evidence of a crime.”); *United States v Hall*, 603 F Supp 2d 1308, 1313 (D Colo, 2009) (“Reminiscent of the infamous bank robber, Willie Sutton’s, reply when asked why he robbed banks (‘[b]ecause that’s where the money is’), the business of illegal drug commerce is conducted on cellphones.”); *United States v Faller*, 681 F Supp 2d 1028, 1046 (ED Mo, 2009) (“[C]ell phones are known tools or instruments of the drug trade.”); *United States v De Jesus Fierros-Alvarez*, 547 F Supp 2d 1206, 1209 (D Kan, 2008) (noting that a cell phone is a “recognized tool” of the drug trafficking trade); *United States v Wiseman*, 158 F Supp 2d 1242, 1249 (D Kan, 2001) (“Defendant asks the court to feign ignorance of what has become common knowledge in the courts, i.e., that cellular phones, complete with memory of numbers recently or frequently called, or their ‘address books,’ are a known tool of the drug trade.”); *United States v De La Paz*, 43 F Supp 2d 370, 376 (SD NY, 1999) (“Having arrested Bulton for narcotics conspiracy, the agents had probable cause to believe that calls to his cellular telephone – a common tool of the drug trade – would provide evidence of his criminal activity.”); and **3) state courts**, e.g., *State v Carroll*, 314 Wis 2d 690, 704; 762 NW2d 404 (Wis App, 2008), quoting *De La Paz*, 43 F Supp 2d at 376 (noting that cell phones are a common tool of the drug trade); *State v Jackson*, 926 So 2d 72, 79 (La App, 2006) (noting that testimony that “items associated with being a drug dealer were found in [the] defendant’s residence (scales, baggies, weapons, cell phone, currency)” was part of the “ample evidence” that the defendant intended to distribute drugs).

to cell phones, which the Supreme Court has noted “are in fact minicomputers.” *Riley*, 573 US at 393; *Bass*, 785 F3d at 1049–1050.<sup>7</sup> Ultimately, *Zuccarini*, the caselaw regarding the ubiquitous nature of cell phone use by drug traffickers, and the caselaw recognizing the necessity of thorough searches of digital devices reasonably linked to criminal activity, all support a conclusion that, in those cases where the totality of the circumstances show that drug trafficking activity is occurring at a particular location or is being conducted by a particular person, it is proper to authorize the police to seize and obtain the data from any cell phones that may be discovered when the warrant is executed. *Robinette*, 519 US at 39; *Russo*, 439 Mich at 606–607.

This case clearly demonstrates this principle. The affidavit here described three locations in Pontiac as the targets for a warrant, as well as an SUV that Det. Gorman saw Defendant driving, due to drug trafficking activity. (32a, 39a–42a) The affidavit described how two named individuals Defendant and Pankey, both of whom had prior drug convictions, were processing and distributing crack cocaine and other drugs from two of the locations (while the third was Defendant’s listed driver’s license address). (39a–43a) A confidential informant previously used by Det. Gorman in other cases also conducted several controlled drug buys from one of the locations. (40a) Defendant was present at the most recent buy, which occurred within the preceding 48 hours, and was identified as Pankey’s cocaine supplier. (40a–41a)

The affidavit also contained information about Det. Gorman’s training and extensive hands-on experience in investigating drug trafficking. (33a–39a) He had been personally involved

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<sup>7</sup> In *Bass*, the Sixth Circuit upheld a warrant that authorized the search of the defendant’s cell phone for any records of communication, indicia of use, ownership, or possession, including electronic calendars, address books, e-mails, and chat logs. *Bass*, 785 F3d at 1050. The Court explained that “[a]t the time of the seizure, . . . the officers could not have known where this information was located in the cell phone or in what format. Thus, the [broad] scope of the warrant was reasonable under the circumstances at that time.” *Id.*

in many such investigations, which gave him familiarity with “the day-to-day operations and the various practices, tools, trends, paraphernalia, and related articles utilized by various traffickers” in their illegal activities. (33a–35a) He described how traffickers are known to operate, such as by accumulating, concealing, and funneling their money and other assets, like drugs. (33a, 35a–38a) He noted it is common for traffickers to maintain both physical (books, receipts, etc.) and electronic (on cell phones, personal digital assistants, pagers, etc.) records and even photographs of their illicit activities, as well as to use electronic devices to facilitate their criminal activities, *i.e.*, communicating with their criminal associates and customers. (33a–34a, 38a–39a) He noted that traffickers maintain records where they have “ready access to them.” (37a)

Based on this information, Det. Gorman’s affidavit noted that his request for a warrant included the seizure and search of any cell phones that might be found at any of the three locations named or in Defendant’s car. (32a) The warrant ultimately included that request. (30a)

As *Zuccarini* held,<sup>8</sup> a broad description, such as “any cell phones” [as compared with “all firearms” in *Zuccarini*], is proper if probable cause exists to support such breadth. Here, the affidavit—read on its face in a commonsense and realistic manner, *Gates*, 462 US at 236—clearly shows that under the totality of the circumstances, *Robinette*, 519 US at 39, a reasonably cautious person in Chief Judge Walker’s position could have concluded that there was a substantial basis for finding probable cause. *Whitfield*, 461 Mich at 446; *Russo*, 439 Mich at 603. Probable cause

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<sup>8</sup> The *Zuccarini* Court also approvingly cited *United States v Savoca*, 761 F2d 292 (CA 6, 1985), which also supports the conclusion that the warrant at issue here properly authorized the officers’ actions. The *Savoca* Court concluded that the description of the things to be seized—“weapons,” “disguises,” “U.S. currency,” and “fictitious identification”—did not present the problem of a “general warrant” because the warrant “was *inclusive*” and did not leave room for unlimited discretion. *Id.* at 298 (emphasis original). Rather, “the actual issue is whether there was probable cause to support a search of this breadth, not whether the warrant was ‘general.’” *Id.* Here, as in *Savoca*, the warrant’s authorization to seize “any cell phones” was inclusive and did not leave room for unlimited discretion in the officers’ determination of what was subject to seizure.

is, after all, only a standard of probability. *Russo*, 439 Mich at 604; *Morris*, 977 F2d at 684. Therefore, the warrant’s description of “any cell phones,” like the description of “all firearms” in *Zuccarini*, properly authorized the police to seize Defendant’s cell phone and obtain its data.

**C. Defendant is incorrect that the affidavit did not contain probable cause to allow the police to seize the cell phone and to obtain all of its data.**

Defendant primarily contends that the affidavit did not contain probable cause to allow the police to seize his phone and obtain all of its data because 1) the affidavit did not contain affirmative allegations that he had used a phone to traffic drugs and 2) the affidavit’s statements about the detective’s training and experience was insufficient to overcome that lack of affirmative allegations of phone use. He is incorrect in both regards.

First, Defendant ignores that probable cause is not a high bar. *Kaley*, 571 US at 338. Rather, the law is clear that it did not have to be certain (or even likely) that the officers would find any cell phones when they executed the warrant. *Gates*, 462 US at 238; *Morris*, 977 F2d at 684. The same is true of other items named in the affidavit, such as safes (36a) and books, records, receipts, notes, and ledgers. (37a) The affidavit simply was *not* required to *prove* that he used a phone to conduct or keep track of his illegal activities, just as it was not required to *prove* that he even had a safe, books, records, receipts, notes, or ledgers at any of the listed locations. *Whitfield*, 461 Mich at 445. Moreover, there was no indication that Defendant’s illegal activity was conducted in an unusual manner, *i.e.*, one that would make it less likely a cell phone would yield fruitful information about his criminal enterprise.<sup>9</sup> All that was needed was, based on the totality of the

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<sup>9</sup> Neither Defendant nor Pankey was, for instance, seen by the police or the confidential informant to be communicating with either their suppliers or their customers by talking in the street, using signal flags, engaging in interpretive dance, or otherwise doing anything that would lead a reasonable person to believe that they may *not* be using the “essential tools” of their trade—cell phones, computers, and other electronic devices—to conduct business. *Portalla*, 496 F3d at 27.

circumstances, *Robinette*, 519 US at 39, a “substantial basis” for Chief Judge Walker to conclude that there was “a fair probability” that cell phones would be found either at the listed locations where drug trafficking was occurring or on the person of the identified drug traffickers and that they might contain evidence of criminal activity. *Keller*, 479 Mich at 474, quoting *Gates*, 462 US at 238–239, quoting *Jones*, 362 US at 271. Ultimately, given the nature of the criminal activity being investigated, *Johnson*, 848 F3d at 878, and the essential nature of cell phones to drug trafficking, *Portalla*, 496 F3d at 27, it was (and is) entirely reasonable to conclude that cell phones containing evidence of criminal activity might be found at the listed locations. *E.g.*, *Odum*, 925 NW2d at 456 (noting that circumstantial evidence may be used to establish the nexus between the place or thing to be searched and the suspected evidence of criminal activity).

Second, Defendant’s argument minimizes and, ultimately, dismisses the long-recognized role that an officer’s training and experience play in determining the existence of probable cause. The United States Supreme Court had long held that an officer’s education, training, and experience may be included in and considered as part of the probable cause calculus for both warranted and warrantless searches alike. *E.g.*, *Ornelas v United States*, 517 US 690, 700; 116 S Ct 1657; 134 L Ed 2d 911 (1996) (“[A] police officer may draw inferences based on his own experience in deciding whether probable cause exist.”); *Steele v United States*, 267 US 498, 504–505; 45 S Ct 414; 69 L Ed 757 (1925) (holding that, based on the agent’s experience and observations, there was probable cause for the issuance of a search warrant and a seizure of contraband). Michigan cases have held as much, *e.g.*, *Custer*, 465 Mich at 331–332 (citing the officer’s training and 23 years of experience as one factor supporting probable cause),<sup>10</sup> as have

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<sup>10</sup> See also *Whitfield*, 461 Mich at 448 (concluding that a warrant was properly issued when a suspected drug dealer produced coin envelopes that, in the affiant’s experience, were consistent with packaged heroin, in response to the affiant’s request for “one” heroin packet, even though the

our sister states, *e.g.*, *Carter v State*, 105 NE3d 1121, 1128 (Ind App, 2018) (upholding a warrant to search a cell phone for evidence of drug dealing when the affidavit described the suspected trafficking activity and the officer’s experience with such activity and the use of cell phones to conduct it).<sup>11</sup> This principle is a reflection of the reality that an experienced officer’s knowledge will always be relevant when drawing reasonable inferences about where incriminating evidence may be hidden. *Holmes v State*, 368 Md 506, 522; 796 A2d 90 (2002) (“[P]robable cause may be inferred from the type of crime, the nature of the items sought, the opportunity for concealment, and reasonable inferences about where the defendant may hide the incriminating items.”).

The Delaware Superior Court’s decision in *State v Ranken*, 25 A3d 845 (Del Super, 2010), which featured a strikingly similar affidavit to the one at issue here, is instructive. In *Ranken*, an officer submitted a 22-paragraph affidavit based on 1) a tip from a confidential informant and 2) a trash pull from outside the defendant’s home that revealed evidence consistent with drug dealing. *Id.* at 847–850. The officer also noted his training and experience related to the illegal drug sales, including that drug dealers use “electronic communication devices such as beepers and cellular phones” to conduct business, and he requested authority to search for and seize such devices. *Id.* at 849–850. He did not allege that the defendant owned or used a cell phone. *Id.* at 848–850.

The court rejected several arguments regarding the sufficiency of probable cause, including a challenge to the six paragraphs in the affidavit concerning the affiant’s training and experience,

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sale was not completed); *Waclawski*, 286 Mich App at 698 (noting that an affiant’s experience “is relevant to the establishment of probable cause.”); *Darwich*, 226 Mich App at 639 (same).

<sup>11</sup> See also *State v McKinney*, 368 NC 161, 164–165; 775 SE2d 821 (2015) (explaining that the evidence in a search warrant affidavit must be “viewed from the perspective of a police officer with the affiant’s training and experience” and with “the commonsense judgments reached by officers in light of that training and experience.”); *Commonwealth v Thompson*, 604 Pa 198, 209–212; 985 A2d 928 (2009) (“[W]e have determined that a police officer’s experience may be fairly regarded as a relevant factor in determining probable cause.”).

because it “overlook[ed] other paragraphs of the affidavit” containing information about the illegal activities inside the home. *Id.* at 863. The court “look[ed] to the entirety of the affidavit and not just so-called conclusory statements from the police,” noting that while “the affidavit must state with particularity that there is corroborated evidence of some illegal activity, *it may also include more general provisions about other illegal activity that could be found*, that relates to the corroborating evidence, but is not necessarily corroborated itself.” *Id.* at 864 (emphasis added).

The court found that the challenged paragraphs were not unsupported, but rather they were “more general statements related to other corroborated specific information” in the affidavit. *Id.* “The officer received a tip, corroborated that tip with marijuana and drug dealing evidence found in the trash bags, and coupled with the evidence that drug dealing was likely occurring at [the residence], the officer applied his training and experience to this evidence to establish that it was likely he would find evidence of contraband in the [defendant’s] residence.” *Id.* That information “[met] the requirements for probable cause under law.” *Id.* The court concluded:

In sum, the challenged paragraphs based on the particularized probable cause to search [the defendant’s] residence coupled with the statements of an experienced drug investigator under the totality of the circumstances and within the four corners of the affidavit are not impermissible. *They are also reasonable inferences for a detached judicial officer to make.* [*Id.* (emphasis added).<sup>12</sup>]

Like the officer in *Ranken*, and countless trained and experienced law enforcement officers across the country, Det. Gorman was well-versed in the pervasive use of cell phones in the illegal drug trade. He clearly described his training and experience (33a–35a, 38a–39a) while also laying out in thorough detail the investigation he had undertaken, which identified Defendant and his associate, Patrick Pankey, as drug traffickers. (39a–43a) Just as in *Ranken*, the affidavit contained

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<sup>12</sup> The court’s decision as later affirmed by the Delaware Supreme Court “on the basis of and for the reasons assigned by the Superior Court[.]” *Ranken v State*, 21 A3d 597 (Del, 2011).

clear, corroborated evidence of specific illegal activity, while the more general provisions concerning the detective's experience related directly to that corroborated evidence, even if it was not itself corroborated.<sup>13</sup> *Ranken*, 25 A3d at 864. Chief Judge Walker reasonably relied on this information when she made her probable cause determination. *Williams*, 472 Mich at 314.

Finally, in contrast all the cases cited and discussed above, Defendant relies on several cases that are easily distinguishable from the facts at issue here. For instance, he argues based on the United States Supreme Court's decision in *Riley*, *supra*, that the seizure and search of a cell phone implicates heightened individual privacy interests, relying primarily on *Riley*'s well-known and unremarkable proposition that modern cell phones often contain an individual's sensitive records in digital form and a "broad array of private information never found in a home in any form—unless the phone is." *Riley*, 573 US at 396–397. However, *Riley* involved two consolidated cases where *warrantless* cell phone searches occurred, *id.* at 378–380. The *Riley* Court never held that cell phones are immune from searches by law enforcement. *Id.* at 401. Instead, the Court concluded its analysis with a simple command for law enforcement officers who wish to search a cell phone in non-emergency situations: "get a warrant," *id.* at 403—which is precisely what the officers here did. The other cases Defendant relies on that involve cell phone searches are similarly distinguishable and unpersuasive in light of their stark factual dissimilarities: they either involved affidavits devoid of any information that could have tied a cell phone to criminal activity or they do not involve drug trafficking, a type of criminal activity in which cell phones are well-recognized as "essential tools of [the] . . . trade." *Portalla*, 496 F3d at 27.

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<sup>13</sup> Again, it must be noted that this Court has long held that an affidavit is not required to *prove* anything. *Whitfield*, 461 Mich at 445. *See also Moats v State*, 455 Md 682, 700; 168 A3d 952 (2017) (noting that the Fourth Amendment has never been held to require an affiant-officer to provide direct evidence linking the crimes described in an affidavit to an object to be searched).

**D. The cell phone data at issue here was obtained by the police in good faith reliance on the district judge's probable cause determination, and thus the exclusionary rule would not apply in any event.**

Defendant also contends that the cell phone data at issue should have been excluded because the police acted improperly when they seized the phone and obtained its data. He is incorrect. In light of the substantial caselaw recognizing that cell phones are essential tools for drug traffickers, Det. Gorman's personal experience with that fact, which he included in the affidavit, and the commonsense, realistic conclusion that such tools probably could be found at the listed locations where drug trafficking was occurring, there was simply no police misconduct that would warrant the application of the exclusionary rule in any event.

The exclusionary rule is a judicially created rule meant "to deter police misconduct rather than to punish the errors of judges and magistrates." *United States v Leon*, 468 US 897, 916; 104 S Ct 3405; 82 L Ed 2d 677 (1984). It "imposes significant costs: it undeniably detracts from the truth finding process and allows many who would otherwise be incarcerated to escape the consequences of their actions." *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 364; 118 S Ct 2014; 141 L Ed 2d 344 (1998). "Indeed, exclusion 'has always been our last resort, not our first impulse,' and our precedents establish important principles that constrain application of the exclusionary rule." *Herring v United States*, 555 US 135, 140; 129 S Ct 695; 172 L Ed 2d 496 (2009), quoting *Hudson v Michigan*, 547 US 586, 591; 126 S Ct 2159; 165 L Ed 2d 56 (2006). "[E]vidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may be properly charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Herring*, 555 US at 143, quoting *Illinois v Krull*, 480 US 340, 348–349; 107 S Ct 1160; 94 L Ed 2d 364 (1987). Thus, the exclusionary rule "should not be applied to deter objectively reasonable law enforcement activity." *Leon*, 468 US at 919.

In *Leon*, the Supreme Court ultimately held that evidence obtained in good-faith reliance on a magistrate's issuance of a search warrant nonetheless remains admissible in a later criminal prosecution even if the warrant is later found to have been invalid. *Leon*, 468 US at 920–925. This Court subsequently adopted *Leon*'s good-faith exception in *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004), holding that, when an officer obtains a search warrant, the exclusionary rule will not apply to evidence seized pursuant to that warrant as long as three conditions apply: (1) first, the police officers' reliance on the district judge's determination of probable cause and on the technical sufficiency of the search warrant must be objectively reasonable; (2) second, the affiant cannot knowingly or with reckless disregard for the truth have provided false or misleading information in the warrant affidavit; and (3) third, the issuing judge may not "wholly abandon" their judicial role when issuing the warrant.<sup>14</sup> *Id.* at 531, 542–543.

Here, there is no indication whatsoever that any of the information in the affidavit was false or misleading. *Id.* at 531, 542. Likewise, there is no indication that Chief Judge Walker, who reviewed the affidavit and authorized the search warrant, "wholly abandoned" her judicial role in doing so. *Id.* Moreover, the officers were in fact clearly aware of the "judicial preference for searches conducted under the authority of a search warrant[.]" *People v White*, 392 Mich 404, 420; 221 NW2d 357 (1974). Det. Gorman and his team did not proceed with their search and did not seize Defendant's cell phone until *after* the detective submitted his 13-page affidavit to Chief Judge Walker and obtained a warrant. (32a–44a) Det. Wagrowski, who ultimately extracted the phone's data, only did so because the warrant authorized it—a fact he testified to at Defendant's

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<sup>14</sup> The *Leon* Court noted that an issuing magistrate is considered to have wholly abandoned their judicial role in situations such as that presented in *Lo-Ji Sales, Inc v New York*, 442 US 319; 99 S Ct 2319; 60 L Ed 2d 920 (1979). *Leon*, 468 US at 923. In *Lo-Ji*, 442 US at 327, the issuing judge "allowed himself to become a member, if not the leader, of the search party which was essentially a police operation," such that he effectively became "an adjunct law enforcement officer."

trial. (342a) Both detectives clearly relied on Chief Judge Walker’s determination that there was probable cause to issue the warrant, and, as the *Leon* Court aptly observed, “[i]n the ordinary case, an officer cannot be expected to question the magistrate’s probable-cause determination or his judgment that the form of the warrant is technically sufficient.”<sup>15</sup> *Leon*, 468 US at 921.

Additionally, the officers’ reliance on Chief Judge Walker’s probable cause determination was also reasonable because the affidavit was not “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Goldston*, 470 Mich at 543, quoting *Leon*, 468 US at 923. Det. Gorman provided extensive details of his drug trafficking investigation in the affidavit, including both his personal observations and his use of a confidential informant to conduct controlled drug buys. (39a–44a) In doing so, he properly stated matters that justified his conclusion that drug trafficking was occurring at the listed locations and that Defendant and Patrick Pankey were the ones conducting that activity.<sup>16</sup> *Rosborough*, 387 Mich at 199. Likewise, the detective also included extensive information about his education, training, and experience with respect to drug trafficking, including drug traffickers’ use of cell phones for various communication and recordkeeping purposes. (33a–39a) The detective did not err by including this information or by expecting Chief Judge Walker to rely on it, because, as previously discussed, both the vital role an officer’s training and experience play in determining probable cause generally, *e.g.*, *Custer*, 465 Mich at 331–332; *Waclawski*, 286 Mich App at 698, and the role of cell phones as essential tools of the illegal drug trade specifically, *e.g.*, *Portalla*, 496 F3d at 27, are well-recognized. Because Det. Gorman acted reasonably, in accordance with existing law and

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<sup>15</sup> *United States v Cardali*, 773 F2d 1128, 133 (CA 10, 1985) (“[I]t must . . . be remembered that the knowledge and understanding of law enforcement officers and their appreciation for constitutional intricacies are not to be judged by the standards applicable to lawyers.”)

<sup>16</sup> Notably, Defendant does not seem to contest that the affidavit provided probable cause to show that he was a drug dealer, and he pleaded no contest to the charges in the drug case.

precedent, the exclusionary rule is simply inapplicable. *See Davis v United States*, 564 US 229, 241; 131 S Ct 2419; 180 L Ed 2d 285 (2011) (“Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.”).

Finally, the warrant itself was not “so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.” *People v Hellstrom*, 264 Mich App 187, 197; 690 NW2d 293 (2004), quoting *Leon*, 468 US at 923. The warrant here specified in detail the places to be searched and the things to be seized, and it also referenced the attached affidavit to ensure that the executing officers were well advised of what they were searching for and seizing. *E.g.*, *Zuccarini*, 172 Mich App at 15–16. *See also* Part III, *infra*.

Thus, the detectives and deputies in both of Defendant’s cases acted in good faith, and even if there was ultimately an error in Chief Judge Walker’s probable cause determination, that error cannot be attributed to the officers. *Leon*, 468 US at 921 (“Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”). Accordingly, there is no basis to apply the exclusionary rule to the cell phone data at issue in this case.

#### **E. Conclusion.**

Probable cause is not a high bar. *Kaley*, 571 US at 338. Given the totality of the circumstances, *Robinette*, 519 US at 39, there was certainly a substantial basis for inferring a fair probability that evidence of criminal conduct would be found on any cell phones found at locations where drug trafficking was occurring. The affidavit at issue here only sought, and the warrant only authorized, the seizure and search of various objects, including cell phones, that are part and parcel of the drug trafficking trade. The probable cause underlying the warrant, as outlined in Det.

Gorman's affidavit, was more than sufficient to permit the officers to seize the cell phone at issue here and to obtain all of its data. *Kaley*, 571 US at 338; *Russo*, 439 Mich at 606–607; *Waclawski*, 286 Mich App at 698; *Johnson*, 848 F3d at 878. Moreover, the officers all acted in objective good faith when they reasonably relied on Chief Judge Walker's probable cause determination, both because the underlying affidavit properly included information about Det. Gorman's investigation and his experience and because cell phones are well-known as essential tools of the drug trade. *Leon*, 468 US at 922; *Goldston*, 470 Mich at 531, 542–543.

Accordingly, there was no error here. Defendant is not entitled to appellate relief, and this Court should deny leave to appeal.

II. The reasonable expectation of privacy Defendant had in his cell phone data was extinguished when the police lawfully obtained the data pursuant to the valid search warrant issued in the drug trafficking investigation.

***Standard of Review & Issue Preservation:***

The People adopt the statement of the Standard of Review & Issue Preservation from Part I, *supra*, because this issue also was not preserved for appellate review.

***Discussion:***

The warrant issued during the drug trafficking investigation both properly authorized the police to obtain all of Defendant's cell phone data and extinguished any reasonable expectation of privacy he had in the phone and its data.<sup>17</sup> The warrant, which was well-supported by probable cause as outlined in Det. Gorman's affidavit, allowed the police to lawfully access and review the phone's data and extinguished any expectation of privacy Defendant otherwise had in the data.

The idea of a "reasonable expectation of privacy" originates from the Supreme Court's oft-cited opinion in *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). In *Katz*, the Court found that government agents needed to first obtain a warrant before bugging a public telephone booth to record the petitioner. *Katz*, 389 US at 353. The Court explained that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."<sup>18</sup> *Id.* at 351 (internal citations omitted).

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<sup>17</sup> In his Issue II, Defendant discusses his standing to raise a Fourth Amendment challenge to the seizure and search of the phone, either in his drug case or this case. Assuming he now claims the phone was his (ownership was *never* discussed below), then he would have had standing to raise such a challenge had he done so earlier. *E.g.*, *People v Zahn*, 234 Mich App 438, 446; 594 NW2d 120 (1999) (noting that standing to challenge a search or seizure exists if a person had a subjective expectation of privacy in the place searched or object seized *and* that expectation is one society accepts as reasonable). However, such a challenge would have failed, as discussed in this brief.

<sup>18</sup> The Court has, of course, clarified that the Fourth Amendment continues to protect property interests. *United States v Jones*, 565 US 400, 406–407; 132 S Ct 945; 181 L Ed 2d 911 (2012).

Justice HARLAN's concurrence summarized the Court's opinion in a two-part test: first, did the individual exhibit a subjective expectation of privacy, and second, is that expectation of privacy one that society is willing to recognize as reasonable? *Id.* at 361 (HARLAN, J., concurring). The "legitimate expectation of privacy" remains the touchstone used to evaluate Fourth Amendment challenges. *Rawlings v Kentucky*, 448 US 98, 104; 100 S Ct 2556; 65 L Ed 2d 633 (1980). Thus, "[i]f the inspection by [the] police does not intrude upon a legitimate expectation of privacy, there is 'search' subject to the Warrant Clause." *Illinois v Andreas*, 463 US 765, 771; 103 S Ct 3319; 77 L Ed 2d 1003 (1983). *See also Custer*, 465 Mich at 333 (same).

Similarly, the Supreme Court has long held that no Fourth Amendment "search" occurs if the amendment's protections have already been negated by some proper means: "[o]nce frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information." *United States v Jacobsen*, 466 US 109, 117; 104 S Ct 1652; 80 L Ed 2d (1984). A second look at lawfully seized or searched objects or information, therefore, is not a search for constitutional purposes. *Illinois v Caballes*, 543 US 405, 408; 125 S Ct 834; 160 L Ed 2d 842 (2005), quoting *Jacobsen*, 466 US at 123 ("Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment."). This principle has long been recognized in search-and-seizure cases. *E.g.*, *United States v Edwards*, 415 US 800, 806; 94 S Ct 1234; 39 L Ed 2d 771 (1974) ("[I]t is difficult to perceive what is unreasonable about the police examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as a result of a lawful arrest.")<sup>19</sup>

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<sup>19</sup> *See also, e.g.*, *United States v Burnette*, 698 F2d 1038, 1049 (CA 9, 1983) ("[O]nce an item in an individual's possession has been lawfully seized and searched, subsequent search of that item, so long as it remains in the legitimate uninterrupted possession of the police, may be conducted without a warrant."); *United States v Grill*, 484 F2d 990, 991 (CA 5, 1973) ("[T]he items in question have been exposed to police view under unobjectionable circumstances, so that no

In this case, the Court of Appeals correctly relied on *Jacobsen, supra*, and held that Defendant's any reasonable expectation of privacy in the cell phone data was extinguished when the police seized the phone and obtained its data pursuant to a valid search warrant. (455a–456a) The probable cause underlying that warrant authorized that action. *See* Part I, *supra*. The Court of Appeals' reliance on *Jacobsen* was not misplaced (as Defendant contends) because that case involved an initial search by a private party. *Jacobsen*, 466 US at 111, 121, 126. Rather, the Court simply (and correctly) relied on the principle that Defendant's reasonable expectation of privacy in the cell phone data was extinguished because the police lawfully acquired it, and, therefore, they were free to review it again later without Fourth Amendment implications. *Id.* at 117.

The cell phone data at issue here was lawfully obtained using a warrant based on ample probable cause, which extinguished any reasonable expectation of privacy that Defendant had in that data. *Id.* “Thus, here . . . there was no question as to probable cause, but only a question as to whether the police were required to go through the additional step of obtaining a warrant before seizing—from themselves, really—the [data] as evidence” to use in this case. *State v Messer*, 164 P3d 421, 425 (Utah App, 2007). They were not. Accordingly, there was no error here.

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reasonable expectation of privacy is breached by an officer's taking a second look at matter with respect to which an expectation of privacy already has been at least partially dissipated.”); *People v Woodard*, 321 Mich App 377, 387, 390–391; 909 NW2d 299 (2017), lv den 501 Mich 1027 (2018) (holding that testing of a lawfully obtained blood sample for the presence of alcohol is not a distinct Fourth Amendment search); *George v State*, 901 NE2d 590, 596–597 (Ind App, 2009) (holding that tablets seized during an inventory were not subject to a second Fourth Amendment search when a deputy contacted a pharmacist to determine their chemical composition); *Wallace v State*, 373 Md 69, 87; 816 A2d 883 (2003) (noting that an “arrestee has no reasonable expectation that the police will not scrutinize closely those items . . . in their legitimate custody, discovering evidence, perhaps, even where none was initially suspected.”); *State v Eady*, 249 Conn 431, 444–445; 733 A2d 112 (1999) (noting that any expectation of privacy in contraband items was eliminated when an agent lawfully entered the premises and saw them in plain view); *State v Jellison*, 236 Mont 300; 769 P2d 711 (1989) (holding that there is no expectation of privacy in property that the police have previously viewed under unobjectionable circumstances).

III. The cell phone data at issue in this case was also, in any event, within the scope of the probable cause underlying the search warrant from the drug trafficking investigation.

***Standard of Review & Issue Preservation:***

The People adopt the statement of the Standard of Review & Issue Preservation from Part I, *supra*, because this issue also was not preserved for appellate review.

***Discussion:***

In addition to the fact that the officers obtaining and reviewing the cell phone data extinguished Defendant's reasonable expectation of privacy therein, *see* Part II, *supra*, the specific data at issue here was, in any event, reasonably within the scope of the warrant because this case is inextricably intertwined with drug trafficking. This is so even though it did not necessarily have to be, given that the warrant properly authorized the police to obtain all the data. *See* Part I, *supra*.

Defendant contends that the cell phone data used in this case did not fall within the scope of the probable cause underlying the drug trafficking case search warrant because the warrant was overbroad. He is incorrect, because, as discussed in Part I, *supra*, the affidavit's probable cause was more than sufficient to allow the police to seize the phone and obtain *all* of its data. However, a brief discussion of the Fourth Amendment's particularity requirement follows, in response to the arguments in Part III of Defendant's brief concerning particularity and broadness.

A warrant must particularly describe both the place to be searched and the persons or things to be seized. *Keller*, 479 Mich at 475.

The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. Thus, the scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." [*Maryland v Garrison*, 480 US 79, 84; 107 S Ct 1013; 94 L Ed 2d 72 (1987), quoting *United States v Ross*, 456 US 798, 824; 102 S Ct 2157; 72 L Ed 2d 572 (1982).]

By obligating officers to describe the items to be seized with particularity, the Fourth Amendment prevents “the issu[ance] of warrants on loose, vague or doubtful bases of fact.” *Go-Bart Importing Co v United States*, 282 US 344, 357; 51 S Ct 153; 75 L Ed 374 (1931). As such, “the requirement of particularity is closely tied to the requirement of probable cause.” 2 LaFave, *Search & Seizure* (4th ed), §4.6(a). A warrant that describes the objects of a search in unduly general terms “raises the possibility that there does not exist a showing of probable cause to justify a search for them.”

*Id.* However, as the Sixth Circuit has explained:

The prohibition on general searches is not . . . a demand for precise ex ante knowledge of the location and content of evidence . . . . The proper metric of sufficient specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation. A search warrant will be valid if it is as specific as the circumstances and the nature of the activity under investigation permit. [*United States v Evers*, 669 F3d 645, 652 (CA 6, 2012), quoting *United States v Richards*, 659 F3d at 541 and *Guest v Leis*, 255 F3d 325, 336 (CA 6, 2001) (internal citations and quotation marks omitted).]

Moreover, this Court has long recognized that courts may consider information in a warrant’s underlying affidavit when determining whether an item to be seized or a place to be searched is described with sufficient particularity. *People v Westra*, 445 Mich 284, 286; 517 NW2d 734 (1994) (per curiam); *People v Urban*, 228 Mich 30, 31–32; 199 NW 701 (1924). The warrant must simply incorporate the affidavit by reference. *E.g.*, *Carter*, 105 NE3d at 1129, quoting *Membres v State*, 889 NE2d 265, 276 (Ind, 2008) (“[T]o satisfy the particularity requirement, it is permissible if a warrant incorporates by reference certain supporting documents—such as the probable cause affidavit—that collectively serve to identify the scope of . . . items that could properly be seized.”) (cleaned up). Ultimately, as noted in Part I, *supra*, a warrant and its affidavit must be read in a commonsense, realistic manner. *Russo*, 439 Mich at 603.

Defendant contends that the warrant here was insufficiently particular, both because it allowed the police to seize any cell phones they found and because it also allowed them to search

those phones “without limitation.” [Defendant’s Brief, at 33.] His is incorrect in both regards. First, the warrant itself explicitly stated that its affidavit was “ATTACHED,” and it specifically referred to the facts stated therein as the foundation for probable cause. (30a) A commonsense reading of both documents, *Russo*, 439 Mich at 603, reasonably allowed the police and judicial officers alike to identify with sufficient particularity the item(s) sought: specifically, any cell phones that could be reasonably viewed as being connected to drug trafficking, because such phones would be found at a location where such activity was occurring. *Robinette*, 519 US at 39. *See also Portalla*, 496 F3d at 27 (noting that cell phones are essential tools of the drug trade); *Zuccarini*, 172 Mich App at 15–16 (holding that a warrant authorizing the seizure of “all firearms” was not overbroad because specific facts alleged that the house was a drug trafficking site and because it was alleged that persons involved in drug use often keep firearms for protection and use during transactions). The warrant therefore was sufficiently particular in this regard to pass constitutional muster.

Second, Defendant’s particularity challenge to the search of the data is equally unavailing. As noted in Part I, *supra*, such challenges have been broadly rejected with respect to searches of computers and similar electronic devices due to the ease with which digital data may be manipulated to conceal criminal activity. *E.g.*, *Bass*, 785 F3d at 1049, quoting *Richards*, 659 F3d at 538–539 (noting that digital files may be hidden, mislabeled, or manipulated to conceal criminal activity, often necessitating broad, expansive searches of digital devices). As the Ninth Circuit has explained, “[t]he prohibition of general searches is not to be confused with a demand for precise ex ante knowledge of the location and content of evidence . . . . The proper metric of sufficient specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation.” *Richards*, 659 F3d at 541, quoting *United States v Meek*, 366 F3d 705, 716 (CA 9, 2004). *See also United States v Giberson*, 527 F3d 882, 888 (CA 9, 2008) (holding

that a warrant authorizing a search for records includes digitally stored data because “attempting to limit Fourth Amendment searches based on the format of stored information would be arbitrary.”). Here, as in *Bass*, the officers had no way to know precisely where in the cell phone any evidence related to drug trafficking would be found. Thus, the warrant was not overly broad when it did not limit the officers’ ability to search the phone’s data.

Finally, in any event, the data at issue here—call logs, text messages, and photographs—fell squarely within the probable cause underlying the search warrant as it was. The warrant authorized the seizure of records pertaining to the receipt, possession, and sale or distribution of controlled substances. *See Giberson*, 527 F3d at 888. The various contacts between Ms. Weber and Defendant on and after August 6, 2016, were rooted in the very same illicit activity the warrant targeted: drug trafficking. In fact, the only reason Defendant came to Mr. Stites’ home on August 6 in the first place was to deliver crack cocaine ordered by Ms. Weber and later consumed by her during her sexual activity with Mr. Stites. (227a–228a, 230a, 245a, 250a–254a) Other text messages that referred to Defendant by name or by his nicknames and photos of him found on the phone (330a–347a, 351a–356a) established his identity as Ms. Weber’s drug supplier on August 6.<sup>20</sup> Thus, the data at issue—which, again, was found on a phone carried on Defendant’s person when he was at a place where drug trafficking was occurring—clearly fell within the scope of the probable cause outlined in the affidavit, and the warrant was not overbroad by authorizing the police to obtain it. *Westra*, 445 Mich at 286. Accordingly, there was no error here.

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<sup>20</sup> The identity of the person who committed a crime is an essential element of any offense. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976).

IV. The review and later use at trial of some of the cell phone data as evidence in this case was also proper because the officers acted in good-faith reliance on both the district court chief judge's probable cause determination after she reviewed the affidavit and the warrant itself.

***Standard of Review & Issue Preservation:***

The People adopt the statement of the Standard of Review & Issue Preservation from Part I, *supra*, because this issue also was not preserved for appellate review.

***Discussion:***

Even though 1) the search warrant in the drug trafficking case properly authorized the police to obtain all of the data from the cell phone they seized from Defendant, *see* Part I, *supra*; 2) the search and later review of that extinguished Defendant's reasonable expectation of privacy therein, *see* Part II, *supra*; and 3) the specific data at issue in this case was, in any event, reasonably within the scope of the warrant because this case is inextricably intertwined with drug trafficking, the use of data from the cell phone as evidence in this case was proper. The officers acted in good-faith reliance both on Chief Judge Walker's probable cause determination, which she made after reviewing the 13-page affidavit submitted by Det. Gorman, and on the warrant itself.

As discussed in greater detail previously in Part I.D, *supra*, the officers acted in good faith when they included a request to search for, seize, and search the contents of any cell phones that might have been located at the sites of Defendant's and Pankey's drug trafficking operation and when they relied on Chief Judge Walker's resulting probable cause determination and the search warrant that she issued. "[E]vidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may be properly charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Herring*, 555 US at 143, quoting *Krull*, 480 US at 348–349. There is no such basis for suppression in this case. The process followed here was precisely what the Fourth Amendment required: a well-trained, experienced officer conducted an

investigation, explained that investigation in an affidavit, and presented it to a neutral, detached judicial officer,<sup>21</sup> who then found probable cause to issue a warrant. The officers were clearly aware of the “judicial preference for searches conducted under the authority of a search warrant,” *White*, 392 Mich at 420, and they acted in conformity with that preference. In doing so, they also followed the United States Supreme Court’s command in *Riley*, *supra*, regarding the authority necessary to search of a cell phone in most cases: they got a warrant. *Riley*, 573 US at 403.

There is simply nothing in the record to show that reasonably well-trained officers like Det. Gorman and Det. Wagrowski should have doubted Chief Judge Walker’s probable cause determination<sup>22</sup> or the sufficiency of the warrant itself. *Leon*, 468 US at 921, 922 n 23. *See also United States v Tracey*, 597 F3d 140, 153 (CA 3, 2010) (“A reasonable officer would also have confidence in the validity of the warrant after presenting it and having it approved by a district attorney and the Magistrate Judge.”). Moreover, under existing jurisprudence, they had no reason to believe (contrary to Defendant’s assertions in the Court of Appeals) that they would have to obtain a second search warrant to review the data once it was in their possession and no longer private. *Davis*, 564 US at 241; *Jacobsen*, 466 US at 117. Thus, there is no basis to impose the exclusionary rule’s significant costs, *Scott*, 524 US at 364, which are reserved for only “the rarest and most outrageous of warranted searches.” *Ashford v State*, 147 Md App 1, 23; 807 A2d 732 (2002). This is not such a case. Accordingly, there was no error here.

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<sup>21</sup> *See Shadwick v City of Tampa*, 407 US 345, 350; 92 S Ct 2119; 32 L Ed 2d 783 (1972) (noting that warrants must be secured from a neutral and detached magistrate).

<sup>22</sup> As Maryland’s highest court recently observed in a case involving a cell phone search, “[t]he ‘standard of factual support required to be presented by the affidavit in order for evidence to be admitted under the good faith exception is considerably lower than the standard for establishing a substantial basis for a finding of probable cause by a judge issuing a search warrant.’” *Stevenson v State*, 455 Md 709, 729; 168 A3d 967 (2017), quoting *Marshall v State*, 415 Md 399, 410; 2 A3d 360 (2010).

V. Defendant's trial counsel acted effectively when he chose not to challenge the admission of the cell phone data in this case on Fourth Amendment grounds because any such challenge would have been futile.

***Standard of Review & Issue Preservation:***

An ineffective assistance of counsel claim "is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the whole record is left with a definite and firm conviction that a mistake has been made." *Bynum v ESAB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002). Questions of constitutional law are reviewed de novo. *LeBlanc*, 465 Mich at 579.

Ineffective assistance claims may be raised for the first time on appeal, but review is limited to mistakes apparent on the record if no evidentiary hearing was held. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). No such hearing was held in this case.

***Discussion:***

Finally, Defendant's trial counsel was not ineffective when he chose not to raise a futile object to the admission of the cell phone data in this case on Fourth Amendment grounds. Accordingly, Defendant is not entitled to appellate relief on this issue.

"Judicial scrutiny of counsel's performance must be highly deferential," because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "[E]very effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

*Id.* A court should not substitute its judgment for an attorney's on matters of trial strategy. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). "[T]he Sixth Amendment . . . does not guarantee infallible counsel." *Leblanc*, 465 Mich at 592.

An attorney is presumed to be effective. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). Courts must "affirmatively entertain the range of possible reasons" that an attorney may have had for their actions. *Cullen v Pinholster*, 563 US 170, 196; 131 S Ct 1388; 179 L Ed 2d 557 (2011). A defendant must exclude all hypotheses consistent with adequate representation, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), by showing: 1) counsel's performance fell below an objective standard of reasonableness, and 2) there is a reasonable probability that, but for any error, the result would have been different. *Strickland*, 466 US at 687; *Vaughn*, 491 Mich at 669. An attorney is not ineffective either for failing to raise a novel argument, *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996), or for failing to "advance a meritless argument or raise a futile objection." *People v Ericksen*, 288 Mich App 192, 205; 793 NW2d 120 (2010).<sup>23</sup>

As discussed in Parts I, II, III, and IV, *supra*, there was clearly no basis for defense counsel Richard Taylor (P55237) to raise a Fourth Amendment challenge. He performed reasonably when he chose not to advance a novel, meritless Fourth Amendment argument. *Strickland*, 466 US at 687; *Reed*, 453 Mich at 695; *Ericksen*, 288 Mich App at 205. Moreover, even if Mr. Taylor had believed such a challenge *might* succeed, it clearly was not certain. Courts do not second-guess attorneys on strategic matters, "even if defense counsel was ultimately mistaken." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has not established that Mr. Taylor acted ineffectively. *Hoag*, 460 Mich at 6. Accordingly, he is not entitled to relief.

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<sup>23</sup> See also *Washington v Boughton*, 884 F3d 692, 701 (CA 7, 2018) ("[A]n attorney is not ineffective for failing to raise a meritless argument."); *People v Bell*, 7 Cal 5th 70, 127; 439 P3d 1102 (2019) (same); *Commonwealth v Carroll*, 439 Mass 547, 557; 789 NE2d 1062 (2003) (same).

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Joshua J. Miller, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny Defendant's application for leave to appeal.

Respectfully submitted,

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